IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 554 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUMANBHAI ISHWARBHAI KATHODI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 554 of 1996

MRS SHILPA J UNWALLA for Petitioner No. 1

MS NANDINI JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 21/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant has, in this appeal, challenged the judgment and order dated 12th April, 1996 of conviction and sentence passed against him in Sessions Case No. 106 of 1995 by the learned Sessions Judge, Surat. The appellant has been convicted for an offence u/S. 302 of the Indian Penal Code (for short 'IPC') and he has been sentenced to suffer rigorous imprisonment (RI) for life and to pay a fine of Rs.2,000/=, in default further RI for two months.

2. The case of the prosecution in nutshell can be stated as under :-

2.1. Deceased Vanitaben was the wife of appellant. The appellant entertained suspicion that the deceased was not loyal to him and she had developed illicit intimacy with several persons. The appellant and the deceased were working in sugarcane fields. On 16th January, 1995 in the evening the appellant came home but the deceased was found absent. He, therefore, waited for her but for the whole night she did not come home. Next day i.e. on 17th January, 1995 in the morning the appellant waited for her on the bank of a canal running through the sugarcane field. He had concealed himself behind the babul shrubs. At about 8.30 a.m. he saw his wife and her maternal aunt approaching the place. The deceased was walking slightly ahead of her maternal aunt. When they came near the spot, where the appellant was hidden, the appellant came out from behind the babul shrubs and accosted his wife, the deceased. He inquired where she was for the whole night and why she did not return home. He further told her that her brother had come and that she should go with him i.e. the appellant. However, the deceased got scared and she refused to go with him. The appellant thereafter, asked her to hand over the implement meant for cutting the sugarcane which in vernacular language is known as Koyta, but the deceased refused to give him that. He, therefore, forcibly snatched it away from her. The deceased pleaded that if the appellant wanted to beat her, he could do it by hands but not with Koyta. This request was not acceded to by the appellant and he gave one blow on the back of the neck of the deceased. The deceased, therefore, started running away from the place and he chased her and gave the second blow in the vicinity of the first blow. As a result of this, the deceased fell down on the ground. Even after she had fallen down, the appellant gave yet another blow on the back of the neck

and it appears that due to these injuries the deceased died on the spot. The prosecution witness Vanitaben, wife of Soniya Chandu was present and had witnessed the incident. She, therefore, raised shouts and the prosecution witness Kaluben, another maternal aunt of the deceased, came there rushing. Thereafter, many people got collected there. However, during this time the appellant left the place.

2.2. The case of the prosecution further is that the appellant himself went to the police station and lodged complaint at Umra Police Station wherein he admitted having killed his wife. According to him, his wife had not returned home previous night and, therefore, next day in the morning when he asked as to where she was for the whole night, she had started abusing him and had given him a reply that she would go anywhere and with any one and the appellant was not at all concerned with it. He, therefore, snatched away Koyta from her hand and gave three blows on the back side of the neck, which caused her instantaneous death. The concerned Police Inspector reduced the complaint into writing and he commenced the usual investigation after registering the offence against the appellant. In the course of the investigation he recorded the statements of various persons conversant with the facts of the case drew necessary panchnamas, arrested the accused, got the post mortem examination of the deceased's body done, sent the blood stained clothes, Koyta, earth, etc. to the Serologist for obtaining his report and upon receipt of the same, he included it in the record of investigation, etc. Upon completion of the investigation he submitted charge-sheet in the Court of the concerned learned Judicial Magistrate First Class, who in turn committed the case to the Court of Sessions at Surat as the offence u/s. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial the Ld. Sessions Judge, Surat framed charge at Exh. 3 against the appellant for the alleged commission of offence made punishable u/S. 302 of the IPC and u/S. 135 of the Bombay Police Act. The appellant pleaded not guilty to the charge and claimed to be tried.

4. The prosecution, to support of its case, relied on oral as well as documentary evidence. In the course of the trial, it examined the following witnesses:-

P.W.1 Dr. Mod. Iqbal Hussen Kureshi, Exh.10 p. 29
P.W.2 Vanita Soniya Chandu, Exh. 15 p. 41

P.W.3 Kaluben W/o. Fulaji Damji, Exh.16 p.45
P.W.4 Ghanshyambhai Dhanjibhai, Exh. 17 p.48
P.W.5 Ramsiromani Hiralal Gupta, Exh. 22 p.53
P.W.6 Dilipbhai Arjunbhai Rathod, Exh. 24 p.57

Upon conclusion of the recording of the evidence the learned trial Judge recorded the further statement of the appellant u/S. 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') and put to him all the incriminating circumstances appearing against him in the evidence with a view to enable him to explain the same, if he so desired. Perusal of the statement u/S. 313 of the Cr.P.C. shows that no specific defence has been taken by the appellant and his defence appeared to be that of general denial.

4.1. At the conclusion of the trial, the learned Sessions Judge convicted the appellant for committing offence u/S. 302 of the IPC and awarded him the sentence as stated above. So far offence u/S. 135 of the Bombay Police Act is concerned, the learned Judge held that the prosecution had failed to establish that charge and hence the appellant was acquitted of the same.

5. Miss Shilpa J. Unwala, learned advocate appearing for the appellant has submitted that the order of conviction and sentence passed by the learned trial Court for offence u/S. 302 of the IPC is not proper in as much as the prosecution has failed to establish its case beyond ay reasonable doubt. She has further submitted that assuming that the evidence brought on record by the prosecution is true, even then it appears from the record that the incident in question had occurred on account of some altercation between the husband and wife involving the character of the wife and ultimately it has culminated into the fatal assault on her by the husband. In other words, she has submitted that there are all chances that the appellant may have committed the act in the fit of grave and sudden provocation and, therefore, his act would stand covered under exception No. I to Section 300 of the IPC and the guilt of the appellant would be at the most for committing offence u/S. 304 Part - I of the IPC. She has further submitted that the incident had taken place in January 1995 and the appellant is since then in the custody. Therefore, ends of justice would meet if the sentence already undergone is awarded to him for committing offence u/S. 304 Part-I of the IPC.

5.1. As against that, Miss Nandini Joshi, Ld. APP appearing for the respondent State has submitted that

the case against the appellant has been proved by the prosecution beyond any reasonable doubt by leading cogent and reliable evidence and the conviction and sentence awarded by the learned Sessions Judge are legal and no interference by this Court is called for. She has further submitted tat there is no an iota of evidence on record to show that the incident had resulted due to grave and sudden provocation and, therefore, the offence committed by the appellant cannot fall u/S. 304 Part-I of the IPC. Lastly, she has submitted that the appeal has no merit and it is required to be dismissed. Both the learned counsels have taken us through the evidence to support their rival contentions.

6. With a view to reappreciate the evidence on record, we have carefully gone through the entire record of the case and have also carefully considered the rival submissions.

7. The prosecution, to establish the fact that the deceased had died homicidal death, has placed reliance on the evidence of P.W.1 - Dr. Mohd. Iqbal Hussen Kureshi, Exh. 10. This witness has carried out the post mortem examination in panel with Dr. P.K. Tiwari on 17th January, 1995 of the deceased. He has prepared the notes of post mortem examination which have been produced on record at Exh. 11. Column 17 of the post mortem notes reflects the external injuries suffered by the deceased. The same have been reproduced by the witness in his evidence before the Court. In his evidence he has stated that the deceased has suffered following injuries :-

i A chop wound over the back of head, 2 cm. below the occipital probubrane at the origin of neck at 1st cervical vertibra. The size of the wound was 14 cm x 3 cm x 6 cm bone deep.

ii A chop wound over the back of right neck in the middle at the level of 4th cervical vertibra of the size of 11 cm x 2 cm x 5 cm, bone deep.

iii A chop wound over the back of neck at the root of the level of 7th cervical vertibra. This wound started from little below the right ear cutting the right cheek muscle reaching the 7th cervical vertibra.

According to him, all these injuries were antemortem. He has also reproduced the corresponding internal injuries in the evidence. He has further stated that the injuries were sufficient in ordinary course of nature to cause death. In the cross-examination on behalf of the

defence, he has stated that it was true that such injuries could be caused by any sharp cutting instrument. He has further stated that it was not possible to say whether the injuries were caused while the deceased and the appellant were in a standing position or the injuries were caused while they were in the process of running.

7.1. Apart from the oral evidence of this witness and the post mortem notes, an inquest panchnama has also been brought on record by the prosecution. The oral evidence of the doctor as well as the aforesaid documentary evidence conclusively proved that the deceased had died homicidal death.

8. So far the actual incident is concerned, the prosecution has placed reliance on the evidence of P.W. 2 - Vanitaben, wife of Somiya Chandu, Exh. 15. In her evidence, she has stated that the deceased was the daughter of her sister-in-law. The incident had taken place one year prior to the date of her giving evidence before the Court, at village Chalthan when they had been there for labour work in the field of sugarcane. She has further stated that the appellant used to quarrel with the deceased very often and he even did not allow her to have food in the house. Though the couple had small children, the appellant did not look after them. She has further stated that on the day of the incident while they were proceeding in the field, the deceased was walking slightly ahead of her. At that time the appellant caught her hand and told her that at their residence her brother had come and she should go to meet him. However, the deceased refused to go saying that the appellant was not telling the truth. The appellant, therefore, asked her to hand over the Koyta to him and he further told her that if she did not want to go home, he alone would go and she should proceed to the field. However, the deceased did not give the Koyta and, therefore, the appellant tried to snatch it away and in the process the appellant could succeed in getting hold of the Koyta. The deceased, therefore, requested him that if he wanted to beat her, he should not beat her with Koyta, but only with hands. The appellant did not listen to her and gave one blow on the back side of her head. The deceased, therefore, started running, but the appellant followed her and gave another blow which landed on the back. As a result of that, she fell on the ground like a severed tree. Even when she had fallen down the appellant gave third blow on the back side and thereafter he ran away carrying with him the blood stained Koyta. She has further stated that immediately she went crying to call the other persons. This witness has stated that the

appellant had a doubt that the deceased was having illicit relations with his younger sister's husband and for that reason there used to be repeated quarrels between them. The witness had identified the appellant in the Court room. In the cross-examination by the defence she has stated that she was married to Soniya Chandu and the had four children. She has further stated that it was not true that she had not stated in the statement before the police that there used to be quarrel between the appellant and the deceased and the appellant did not allow the deceased to have food and he alone consumed the food cooked for all. She has stated in the cross-examination that on previous night the deceased had stayed at the place of her maternal aunt i.e. Kaluben. She has denied the suggestion of the defence that she had not witnessed the incident and she was giving evidence with a view to falsely implicate the appellant in this case.

8.1. The next witness is P.W. 3 - Kaluben, wife of Fulaji Damji, Exh. 11. This witness is the aunt of the deceased. In her examination-in-chief she has stated that the incident had taken place around 8.00 O'clock in the morning near the canal running in the field. She has further stated that at the place of incident, there are babul trees and trees of eucalyptus. She has further stated that at that time all the ladies were going for labour work. When she heard the shouts of Vanita i.e. P.W. 2, she went to the spot and saw that the appellant had killed the deceased and he was running away. Except that she had not seen anything. At that stage of the recording of the evidence, the learned Public Prosecutor requested the Court to grant him permission to draw the attention of the witness to some portion of her statement recorded by the police to refresh her memory, which despite the objection by the defence, was granted. She thereafter has stated that there was an attempt made by appellant to snatch away Koyta from the hands of deceased and she had seen the scuffle between the two from a distance and while the deceased was making an attempt to run away from the place, the appellant had given a blow with Koyta on her neck. She further states that she had also seen this assault on the deceased. In the cross-examination by the defence she has stated that on the previous night the deceased had stayed at her place. She had further stated that next morning when they were going for labour work the deceased and P.W. 2 Vanita were walking ahead of them and they were at a distance of about 300 ft. behind them. She has also stated that when she heard the shouts of Vanita, she went there and saw that the deceased, also

named Vanita, had died; whereas Vanita the P.W. 2 was crying. She has denied the suggestion of the defence that she did not have any personal knowledge about the incident. She has also denied that she had only seen the appellant running away. She has stated that when the incident occurred and when she reached the spot, her husband was with her. However, they did not go to inform the police, but the appellant himself had gone there and while they were still there the police had arrived. An attempt has been made by the defence to show that because of the growth of babul trees and trees of eucalyptus, she would not have been able to see the incident. In the cross-examination the defence has made suggestion to this witness that the deceased was having illicit relations with Vasanto or Savanto and Savanoto & Kotvaliyo often used to go to meet the deceased. She has flatly denied this suggestion. She has also denied the suggestion that on the day of incident Vasanto and Kotvaliyo had gone to meet the deceased.

8.2. P.W. 4 - Ghanshyambhai Dhanjibhai, Exh. 17 has acted as a panch. He has stated that he was called at the police station and when he reached there one person was sitting there who had put on light lining shirt and ash colour pent. He had one Koyta with him, which was smeared with blood. There was blood stain on the right hand side sleeve of the shirt. He has stated that in his presence the police had attached the Koyta, shirt, Baniyan and pent of that person. He has identified that person in the Court as accused. In the cross-examination he has stated that he is plying rickshaw to earn his livelihood. On that day while he was having tea from the hawker near the Umra Police Station, he was called by the police to act as Panch. He has further stated that it was for the first time he had gone to police station to act as panch. He has denied the suggestion that panchnama was kept ready and he had merely signed it. He has further stated that the second panch was one Dipakbhai, who was also having tea with him when he was called to act as panch.

8.3. P.W. 5 - Ramsiromani Hiralal Exh. 22 has acted as a panch while the blood stained earth was collected from the scene of offence. He has stated that at the scene of offence there was blood spilled over the ground and the blood stained earth was collected by the police. In the cross-examination nothing of much importance from the point of view of defence was elicited from this witness by the defence.

8.4. The last witness is P.W. 6 - Dilipbhai

Arjunbhai Exh. 24. He is the Police Inspector who has carried out the investigation in the case. He has stated that on 17th January, 1995 he was discharging duty at Umra Police Station. At about 10.00 to 10.15 a.m. one Goman Ishvar had been to the police station and he had given a complaint which was recorded by him. On the said complaint he had put his left hand thumb impression. The complaint was reduced into writing by the writer Constable. He has further stated that on receipt of the complaint, he registered the offence and commenced investigation. He has also stated that he had seized the offending article and clothes of the appellant and had also drawn the panchnama of his person. He has further stated that the witness Bai Vanita had shown the scene of offence and he had accordingly drawn the panchnama of the scene of offence and also collected the blood stained earth from there. In the rest of the examination-in-chief he has described the course of investigation carried out by him. In the cross-examination the defence has brought on record the omissions from the statement of witness Bai Vanita and witness Kaluben. He has denied the suggestion that he had falsely created a case against the appellant and no such incident had ever taken place. He has further denied the suggestion of the defence that the appellant had not given any complaint to him.

9. The aforesaid evidence and in particular that of eye witnesses, namely P.W. 2 and P.W. 3 clearly shows that on the date of incident the appellant had concealed himself behind the cluster of babul trees and waited for the deceased to go there. When she came there the appellant all of a sudden appeared and started making inquiry regarding her whereabouts on the previous night as he had strong suspicion in his mind that the deceased had gone to sleep with one of her paramours. He even asked the deceased to go with him to their residence on the pretext that her brother had come there. However, the deceased refused to go with him and, therefore, he demanded Koyta which was carried by the deceased. It clearly appears that the deceased had immediately realised the real intention of the appellant and, therefore, she refused to part with it. However, the appellant forcibly snatched away the Koyta from the deceased. The deceased, therefore, requested him that if he ever wanted to beat her, he should not do it with Koyta but he could do it with hands. However, that request was not accepted by the appellant and he gave one blow on the back of the head of the deceased. The deceased with a view to save herself started running away but the appellant chased her and while she was in the

process of running, he gave the second blow which fell on the back side of the neck, as a result of which the deceased immediately fell down on the ground. The appellant did not stop there. He even gave the third blow on the same portion of the body while the deceased was lying on the ground. This assault caused instantaneous death of the deceased. The appellant thereafter ran away from the place and he himself went to the police station and gave a complaint against himself wherein he has admitted the assault on the deceased by him and thereby causing her death. Ofcourse, he has tried to make out story that the deceased was having illicit relations with certain persons and, therefore, she had not returned to their residence previous night and had gone to sleep with some one else and in the morning when he asked her regarding her whereabouts the previous night, she quarrelled with him and told him that he had no business to ask her what she was doing in the previous night. This say of the appellant is, however, not supported by the eye witnesses i.e. P.W. 2 Vanitaben, wife of Soniya Chandu. She has not stated a word about such talk having taken place between the two. Not only that but even in her cross-examination no suggestion had been made on behalf of the defence with regard to any such talk having taken place between the deceased and the appellant. It is, therefore, obvious that what the appellant had narrated in the complaint was not true. In fact from the evidence of P.W. 2 Vanitaben and P.W. 3 Kaluben, wife of Fulaji Damji, the real facts are emerging and they are to the effect that the appellant, with intention to cause fatal assault on the deceased, snatched away the Koyta carried by her and gave three blows on the vital part of the body, namely the back side of the head and the neck, which had caused serious injuries to cervical vertibra of the deceased. The evidence also shows that the deceased had gathered the intention of the appellant that he would kill her and, therefore, she refused to part with Koyta and when the appellant managed to snatch it away from the deceased, she even pleaded that she should not be beaten with Koyta but only with hands. However, the appellant had other ideas and he gave three successive blows on the back side of the deceased causing serious injuries, which resulted into immediate death of the deceased. The defence has not been able to elicit from both these witnesses anything which may render their evidence doubtful. Both the witnesses have stood their ground very firmly. In view thereof, there is nothing on record which may dissuade us to believe their evidence.

9.1. Further their evidence stands amply

corroborated by other independent evidence produced by the prosecution on the record in the form of recovery of blood stained Koyta, blood stained clothes of the appellant, the blood stained earth from the scene of offence, etc. All these articles were sent to the forensic laboratory and the report of the Serologist indicates that these articles were stained with blood of the deceased belonging to 'B' group. It is also on record that the blood stained Koyta was produced by the appellant himself before the police. So far allegation with regard to the deceased having illicit relations with others is concerned, there is no evidence on record which may support the say of the appellant. The appellant had entertained a doubt that on the previous night the deceased had slept with one of her paramours. But the evidence of P.W. 3 Kaluben shows that there was no substance in that allegation as she had slept at her place. Kaluben is the maternal aunt of the deceased. It is also in evidence that the appellant repeatedly quarrelled with the deceased and he even did not allow to have food in the house. Though the concerned witness, namely P.W. 2 has not stated so in the statement before the police this fact, the learned trial Court by assigning cogent reasons has believed it to be true and we have no reason to have any different opinion on that count. It is, therefore, very natural that to save herself from the harassment of the appellant on the previous night, the deceased might have slept at the place of Kaluben. Therefore, there was no reason for the appellant to entertain any doubt with regard to her chastity. It appears from evidence that on the day of incident the appellant had decided to do away with the deceased and that was the precise reason he had concealed himself in the trees and when she came there he levelled all sorts of allegations against her and thereafter by snatching away Koyta from her, caused her fatal injuries. The evidence of P.W. 1 Dr. Mohd. Iqbal Hussen shows that these injuries were sufficient in ordinary course of nature to cause death. The prosecution, therefore, has been successful to show that the appellant was responsible for committing an act, namely the culpable homicide amounting to murder. It is clear that the appellant had caused the death of the deceased by intentionally causing her the bodily injuries and these injuries were sufficient in ordinary course of nature to cause death. Therefore, the case of the appellant stands covered under clause 3rdly of section 300 of the IPC. We are, therefore, in complete agreement with the finding given by the trial Court on this count.

10. So far offence u/S. 135 of the B.P. Act

is concerned, the appellant has been acquitted and no appeal has been filed against the same order by the State. That order, therefore, remains as it is.

11. As a result of the aforesaid discussions, this appeal deserves to be dismissed and it is hereby ordered to be dismissed.

Muddamal articles to be disposed of in terms of the directions given by the learned trial Judge.

[B.J. SHETHNA, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.